Supreme Court, U.S.
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No. 15-628

In The

Supreme Court of the United States

BASSAM YACOUB SALMAN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

I. PERSONAL BENEFIT.

1. Just a few months ago, the government urged the Court to review the Second Circuit's interpretation of "personal benefit" in *United States v. Newman*, 773 F.3d 438 (2d Cir. 2014), *cert. denied*, 136 S. Ct. 242 (2015). The government declared that the *Newman* personal benefit definition created a split in the circuits and threatened to "hurt market participants, disadvantage scrupulous market analysts, and impair the government's ability to protect the fairness and integrity of the securities markets."[1] It added that *Newman* "created an upheaval in insider-trading law by rewriting the settled test announced in" *Dirks v. SEC*, 463 U.S. 646 (1983).[2] The government asserted that "[d]elay in [overturning the *Newman* personal benefit standard] will result in continuing and serious harm." Government *Newman* Petition at 26.

Nothing has changed since the government urged the Court to review the "personal benefit" element of insider trading. *Newman* remains the law in the Second Circuit, the "'Mother Court' in this area of the law." *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 762 (1975) (Blackmun, J., dissenting). The conflict between *Newman* and

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[1] *United States v. Newman*, No. 15-137, Petition for a Writ of Certiorari at 14-15 ["Government *Newman* Petition"].

[2] *United States v. Newman*, No. 15-137, Reply Brief for the Petitioner, at 1.

decisions of the Ninth Circuit (in this case) and the Seventh Circuit (in *SEC v. Maio*, 51 F.3d 623 (7th Cir. 1995)) remains and undoubtedly will deepen as other circuits decide whether to follow *Newman*.

Although the reasons for reviewing the "personal benefit" question are at least as strong as they were when the government filed its petition in *Newman*, it nonetheless opposes review here.[3] The government appears to have changed its position solely because it views the result in this case as correct. BIO at 13. But whether a circuit split warrants this Court's review does not depend on who won below. It turns instead on whether the court of appeals "has entered a decision in conflict with the decision of another United States court of appeals on the same important matter." Sup. Ct. R. 10(a). The government acknowledged in its *Newman* petition both the split in the circuits and the importance of the question presented.

2. The government disputes that this case presents a better vehicle than *Newman*. BIO at 12-13. In *Newman*, however, resolution of the "personal benefit" question made no difference to the outcome. Because respondents Newman and Chiasson were so far removed from the tipper, they had no knowledge of any personal benefit, regardless of how defined.[4]

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[3] Brief in Opposition ["BIO"] at 9-13.

[4] *United States v. Newman*, No. 15-137, Brief for Todd Newman in Opposition, at 2 ("[E]ven if this Court were to agree with the government that the Second Circuit misstated the type of evidence required to support an inference of a benefit, the decision dismissing the indictment on the independent ground that Newman did not know of any benefit would stand."); *see id.*, Brief for Respondent Anthony Chiasson in Opposition, at 2

Here, by contrast, resolution of the "personal benefit" question indisputably determines the outcome of the case.

II. WILLFUL BLINDNESS.

1. In *Global-Tech Appliances, Inc. v. SEB S.A.*, 131 S. Ct. 2060 (2011), this Court held that a defendant cannot be willfully blind unless he takes "deliberate actions" or "active steps" to avoid knowledge. *Id.* at 2070. The government--echoing the position of the court of appeals--insists that a defendant can be willfully blind if he takes no "actions" or "steps" at all--if he merely fails to investigate suspicious circumstances. BIO at 16-17. As demonstrated in the petition, however, predicating willful blindness on a failure to investigate obliterates the distinction the Court drew in *Global-Tech* between willful blindness and recklessness.

The government acknowledges that *Global-Tech* specifically rejected "deliberate indifference" to a "known risk" as an adequate predicate for willful blindness. BIO at 16 (citing *Global-Tech*, 131 S. Ct. at 2071). But the government never explains the difference between a failure to investigate suspicious circumstances (which the court of appeals deemed

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(continued...)

("This Court's review would prolong this ordeal for no reason: The outcome of this case would be the same, whether or not this Court agreed with the Government's misreading of the decision below. That is because the question presented implicates just one of two independent grounds for the judgment below ").

sufficient for willful blindness) and deliberate indifference to a known risk (which this Court found insufficient in *Global-Tech*). The government's silence is telling; in fact, the two standards are functionally identical. If deliberate indifference to a known risk falls short of willful blindness, as *Global-Tech* held, then a failure to investigate suspicious circumstances must also fall short.

The government relies heavily on a footnote in *Global-Tech* citing court of appeals cases with varying formulations of the willful blindness standard. BIO at 15-16 (citing *Global-Tech*, 131 S. Ct. at 2070 n.9). That footnote might (or might not) have significance if the Court reviews a willful blindness *jury instruction* in a later case. Perhaps the requirement of "deliberate actions" or "active efforts" can be conveyed adequately to the jury by different formulations. But this case presents a more fundamental question: whether a mere failure to investigate suspicious circumstances, without more, satisfies the *Global-Tech* "deliberate actions" requirement (regardless of how that requirement is phrased). The answer to that question determines whether a willful blindness instruction may be given at all. The proper formulation of the instruction does not become an issue unless the court finds that the government has produced sufficient evidence to permit a jury to find the elements of willful blindness proven, including the "deliberate actions" element.

2. The government surmises that "petitioner must have taken steps to avoid discovering key information about the corrupt

insider trading scheme." BIO at 17. But the government presented no evidence at trial of any "steps" petitioner took to avoid learning the source of the stock tips. The government's resort to speculation about "steps" petitioner "must have taken" tacitly concedes that the *Global-Tech* "deliberate actions" requirement does not permit willful blindness to rest solely on a failure to investigate.

The government's speculative argument *presumes* that a defendant who fails to investigate suspicious circumstances has taken "active steps" to avoid discovering the suspected fact, even when (as here) there is no evidence that he has done so. Such a presumption eliminates the clear line *Global-Tech* drew between willful blindness on one hand and recklessness or deliberate indifference on the other. The government could argue by the same logic that a defendant who is deliberately indifferent to a known risk that a certain fact is true "must have taken steps to avoid discovering" that fact. Such a presumption would overturn *Global-Tech*, which rejected deliberate indifference as a predicate for willful blindness.

3. The Ninth Circuit is not the only court of appeals to misread the *Global-Tech* "deliberate actions" requirement. As the petition demonstrates (Pet. at 20), the Second and Eighth Circuits have similarly held that a failure to investigate suffices for willful blindness. Neither of those courts has explained how *inaction*--a failure to investigate--can amount to "deliberate actions" or "active steps." A concurrence from the Second Circuit goes so far as to

brand this Court's "deliberate actions" formulation a "mistake[]." Although acknowledging that *Global-Tech* "used words that might be construed as confirming the defendant's argument that 'the defendant must take deliberate actions to avoid learning of [the culpable] fact,'" the concurrence concludes that the Court was "merely (mistakenly) summarizing what it understood to be the positions of the various circuits." *United States v. Fofanah*, 765 F.3d 141, 151 n.2 (2d Cir. 2014) (Leval, J., concurring) (quoting *Global-Tech*, 131 S. Ct. at 2070), *cert. denied*, 135 S. Ct. 1449 (2015). In light of this Court's alleged "mistake," the concurrence appears to contend, the lower federal courts can disregard the *Global-Tech* "deliberate actions" requirement. Although the *Fofanah* concurrence uses unusually blunt language, its conclusion--that the "deliberate actions" requirement can be ignored--has taken firm root in at least three circuits.

4. Seeking to distinguish *United States v. Macias*, 786 F.3d 1060 (7th Cir. 2015), the government asserts that the defendant in that case "had no reason to think to inquire," while it was "unnatural" for petitioner not to investigate. BIO at 20. That is, at best, a strained distinction between the two cases; it is no more "unnatural" for the recipient of stock tips to fail to ask their source than for a smuggler of illegal proceeds to fail to make a similar inquiry. More fundamentally, however, the "natural/unnatural" distinction the government draws has no basis in *Global-Tech*. *Inaction* does not become *action* merely because it might have been natural to act. Whether natural or unnatural, a failure to investigate amounts at most to the

"deliberate indifference" that *Global-Tech* found insufficient to establish willful blindness.

5. Finally, the government asserts that this is a poor vehicle for resolving the confusion in the circuits over *Global-Tech* because the error in giving the willful blindness instruction was harmless. BIO at 21-22. As the petition explains, however, the government's actual knowledge case rested heavily on the unreliable testimony of Michael Kara and was thus far from overwhelming. Pet. at 21. In any event, this Court often grants certiorari to review important questions and leaves it to the lower courts on remand to determine whether any error requires reversal. *See, e.g.*, *Skilling v. United States*, 561 U.S. 358, 414-15 (2010); *Boulware v. United States*, 552 U.S. 421, 438-39 (2008). A similar approach is appropriate here.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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